COMMISSION

COMMISSION DECISION

of 29 November 1995

relating to a proceeding pursuant to Article 85 of the EC Treaty

(IV/34.179, 34.202, 216 — Stichting Certificatie Kraanverhuurbedrijf and the Federatie van Nederlandse Kraanverhuurbedrijven)

(Only the Dutch text is authentic)

(95/551/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 3 (1) and Article 15 (2) thereof,

Having regard to the complaint submitted on 13 January 1992 by M.W.C.M. van Marwijk and others, together with an application for interim measures, and having regard to the statutes and rules notified on 15 January 1992 by the Stichting Certificatie Kraanverhuurbedrijf and on 6 February 1992 by the Federatie van Nederlandse Kraanverhuurbedrijven,

Having given the parties concerned, in accordance with Article 19 (1) of Regulation No 17 and with Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2], the opportunity of being heard on the matters to which the Commission has taken objection,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

The complaint

(1) On 13 January 1992 a complaint, together with an application for interim measures, was submitted by M.W.C.M. van Marwijk and ten other firms alleging that the Federatie van Nederlandse Kraanverhuurbedrijven (hereinafter referred to as 'FNK') and the Stichting Certificatie Kraanverhuurbedrijf (hereinafter referred to as 'SCK') had infringed the competition rules in the EC Treaty by excluding undertakings which are not certified by SCK from hiring out mobile cranes and by imposing fixed price rates under their statutes and rules.

The notified agreements

(2) SCK's statutes [3] and its rules on certification of the crane-hire trade [4], (hereinafter referred to as 'the rules'), including various annexes of which the most important are the certification requirements, were notified to the Commission on 15 January 1992. FNK's statutes [5] and internal rules [6] were notified on 6 February 1992. In both cases, an application was made for negative clearance or, alternatively, exemption pursuant to Article 85 (3).

FNK

As notified, FNK's rules contain, *inter alia*, a requirement that members charge reasonable prices for hiring out cranes and apply the general conditions issued by FNK, which contain provisions relating to price (Article 3 (b) and (c) of FNK's internal rules), and a requirement that they give preference to other members when hiring extra cranes (Article 3 (a) of FNK's internal rules).

SCK

As notified, SCK's rules contain, *inter alia*, a ban on undertakings affiliated to SCK from hiring extra

[1] OJ No 13, 21. 2., 1962, p. 204/62.
[2] OJ No 127, 20. 8. 1963, p. 2268/63.
[3] Dated 9 January 1992.
[4] Dated 1 January 1992.
[5] Dated 17 July 1989.
[6] Dated 31 October 1988.

cranes from non-affiliated undertakings (the 'inhuurverbod' in the second indent of Article 7 of SCK's rules).

The parties

(3) The complainants are firms which hire out mobile cranes. When the complaint was submitted, nine of them were established in the Netherlands and two in Belgium, and none of them was a member of FNK or affiliated to SCK. Since the complaint was submitted in January 1992, three complainant crane-hire firms have become members of FNK and one has also become affiliated to SCK.

(4) FNK is an association of firms which hire out mobile cranes. It was established on 13 March 1971 and has its registered office at Culemborg. Its object, as laid down in the statutes, is to promote the interests of crane-hire companies, particularly of FNK members, and to foster contact and cooperation in the broadest sense between members. Under the statutes, undertakings established outside the Netherlands cannot be members. In mid-1994, the association had 196 members.

(5) SCK, which has its registered office at the same address in Culemborg, was set up on 13 July 1984. According to its statutes, the object of the organization is to promote and maintain the quality of crane-hire companies [1]. For that purpose SCK set up a private-law certification system on a voluntary basis. In mid-1994, 190 firms were affiliated to SCK, most of them being firms which were also members of FNK [2].

The market

(6) The cranes in question are employed, above all, in the construction, petrochemical and transport industries in the Netherlands. In the crane-hire business, the hiring of extra cranes from other crane-hirers occurs on a large scale. As a means of equipment rationalization and optimum capacity utilization, the temporary hire of (extra) cranes may be more attractive than purchase. At the time of notification, there were, according to FNK, about 350 crane-hire firms in the Netherlands, with a total turnover of some ECU 450 million. According to an independent survey of the sector carried out in 1990, the market share of FNK members and SCK certificate-holders was an estimated 78 % [3]. FNK and SCK estimate their market share in 1992 at about 51 %, the total number of cranes for hire in the Netherlands being put at about 3 000 and the number of cranes owned by FNK members at 1 544 [4]. Because of transport difficulties, according to FNK, most cranes operate within a radius of about 50 kilometers, which would limit the market in the Netherlands for firms from other Member States to areas near the Belgian and German borders.

Government supervision

(7) Under the Law on Conditions at the Workplace (Arbowet), employers must ensure that the tools and equipment they use are appropriately and reliably constructed. They are also required to have such equipment inspected periodically. In various safety decrees based on the Law on Conditions at the Workplace, these rules are stipulated in greater detail. Particular mention may be made here of the Decree on Safety in Factories and at Worksites and the Decree on Safety at other types of Workplace, in which provisions are laid down relating to the safe construction and safe use of cranes and lifting equipment. These provisions are spelt out in detail, as regards the various types of crane and the various types of lifting equipment, in ministerial regulations and various leaflets of the Labour Inspectorate, with due regard to the requirements laid down in Council Directive 89/392/EEC relating to machinery [5]. Germany and Belgium have comparable legal systems.

[1] Originally, SCK's object was to promote and maintain the quality of crane-hire companies in the Netherlands. Under an amendment to the articles dated 9 January 1992 the words 'in the Netherlands' were deleted.

[2] Of the 190 undertakings which on 21 July 1994 were affiliated to the SCK only seven were not members of the FNK. Conversely, on 21 July 1994, only 12 of the 196 FNK members were not certified by the SCK.

[3] According to this sectoral survey by the Nederlandsche Middenstands Bank (NMB), in 1990 there were 240 — 280 active crane-hire firms, of which more than 170 were affiliated to the FNK: FNK's market share for 1989 was thus estimated by the NMB at 78 % (HF 344 — 440 million), assuming an average turnover of HF 254 000 per crane, 1 354 cranes owned by FNK members and the fact that non-FNK members are relatively small firms.
According to the final assessment report on SCK by the Certification Council (Raad voor de Certificatie) of 11 January 1993, about 70 % of cranes hired in the Netherlands are from SCK certificated companies.

[4] According to the KeBoMa annual report for 92, there are 3 432 mobile cranes in the Netherlands, of which, according to FNK/SCK, about 3 000 are for hire.

[5] OJ No L 183, 29. 6. 1989, p. 9. Directive as last amended by Directive 93/68/EEC, OJ No L 220, 30. 8. 1993, p. 1. Cranes were brought within the scope of the Directive by another amendment: Directive 91/368/EEC (OJ No L 198, 22. 7. 1991, p. 16).

Statutory inspections of cranes and lifting equipment are carried out before first entry into service (1), three years later and every two years thereafter. The Foundation KeBoMa (Keuring BouwMachines), at Ede, was designated in 1982 by the Minister for Social Affairs, under the Decree on Safety in Factories and at Worksites, as the institution responsible for carrying out inspections and tests of, *inter alia*, cranes and lifting equipment (2). KeBoMa is the only approval body designated and recognized by the Government to do such work (3). If any serious shortcomings are found, KeBoMa has to inform the Labour Inspectorate. In addition to statutory inspections by KeBoMa, employers are required to have the cranes checked at least once a year by an expert who, in the Labour Inspectorate's opinion, is sufficiently qualified for the task (4).

Structure of FNK and SCK

(8) SCK is recognized by the Certification Council as a certification institution, which means amongst other things that, in the Certification Council's view, it meets the requirements of independence.

(9) This does not alter the fact that there are close links between FNK and SCK. From SCK's establishment to 15 December 1987, its entire board was, in accordance with the statutes, appointed and could be dismissed by the executive committee of FNK. Since the statutes were amended on 15 December 1987, SCK's board itself fills the vacancies, but the members who come from the industry (half the board) were until 20 June 1994 appointed on a binding recommendation from FNK. Only on that date was the binding character of that recommendation done away with. Thus, until then, FNK had a decisive influence on the appointment of at least half the SCK board. As decisions of the SCK board are taken, in accordance with the statutes, by a simple majority, it follows that in practice the board cannot take a single decision without FNK's approval.

The board is assisted by an advisory body, which since 20 June 1994 has been referred to as the Committee of Experts, whose members are appointed and dismissed by the SCK board — acting until 15 December 1987 in consultation with the executive committee of FNK and from that date until 20 June 1994 after consulting FNK, which may itself also propose names. The Committee of Experts consists of eight members: two from the FNK itself, three from affiliated organizations and (associations of) undertakings which place contracts with crane-hire firms, and three other members. The Committee's task includes advising SCK's board on the nature and content of the certification system and the establishment of the inspection requirements and methods underlying the certification system. The Committee's advice is binding (Article 2 of its rules).

Individual certification decisions are taken by the Certification Committee, which consists of two members of the board who are not from the industry (but one of whom is an ex-representative of a firm awarding contracts) and the chairman of the Committee of Experts. The Certification Committee is appointed by SCK's board.

In its notification, SCK explicitly pointed out that it was set up on the initiative of FNK (5). Furthermore, it is clear from the statutes that SCK was set up on behalf of FNK as principal. The two organizations have the same address and secretariat, and until 1 January 1993 had the same telephone number (6). The statutes and rules of the two organizations were notified by the same representative and in the same form. This same representative replied on behalf of both FNK and SCK to the statement of objections of 16 December 1992 and the statement of objections of 21 October 1994. Until September 1987, an applicant had to be a member of FNK in order to be eligible for certification by SCK. Until October 1993, SCK certificate-holders were obliged to apply the general conditions drawn up by FNK.

From September 1987 to 1 January 1992 participation in the SCK certification arrangements was roughly three times cheaper for FNK members than for non-members, and during the same period SCK received a subsidy from FNK. From 1985 to 1987, SCK also received a subsidy from the Netherlands State.

(1) Since 1 January 1993, pursuant to the Machinery Directive (see preceding footnote), testing no longer applies to cranes which bear a 'CE mark', subsequently renamed 'CE marking' under Article 6 of Directive 93/68/EEC, and are accompanied by a declaration of conformity in accordance with the Directive.

(2) Recognition by the State Secretary for Social Affairs and Employment, 18 February 1992. Decision No 2306/77, Nederlandse Staatscourant 77.

(3) KeBoMa's annual report for 1992, p. 1.

(4) Such an expert may, for instance, be the supplier of the crane, but in practice KeBoMa is often called in.

(5) See point 4 of the notification. This is also explicitly apparent from the final assessment report on SCK, p. 3, mentioned in footnote 3, p. 80.

(6) Since 1 January 1993, however, SCK, according to a letter dated 21 July 1994, has been using a different postal address.

Behaviour of the FNK and the SCK

FNK

(10) Under its statutes, FNK's object is to promote the interests of the crane-hire business in general and of its members in particular and to encourage contacts and cooperation in the broadest sense between members. Those objectives, and the manner in which they are to be achieved, are set out in the statutes and internal rules. Under Article 6 (1) of the statutes, decisions which are taken in accordance with the statutes and rules are binding on members. Any member that acts in breach of this rule may have its membership cancelled pursuant to Article 10 (1) (d).

From 15 December 1979 to 28 April 1992, FNK's internal regulations required FNK members to give preference to other members when hiring or hiring out cranes and to charge 'reasonable' rates. To this end, until 1992 FNK published cost calculations, and recommended rates based on them, in the handbook it issued. According to an independent sectoral survey, those recommended rates were generally higher than the market rates [1]. Until 1992, discussions regularly took place between crane-hire firms with certain categories of crane about recommended rates and internal rates — that is, the rates charged between crane-hire companies when hiring or hiring out cranes. The internal rates were generally somewhat lower than the recommended ones but higher than the market rate [2]. FNK's involvement in these discussions is clear, *inter alia*, from the fact that FNK made its secretariat available for such discussions and from the fact that an assistant in the secretariat was instructed to draft the report and handle the other administrative matters [3].

In addition, FNK members are obliged under the internal rules to apply the general conditions drawn up by FNK [4]. These contain detailed instructions on prices and rates; thus, among other things, minimum rental hours, higher rates for Sundays and holidays and cancellation costs are prescribed, and reference is made to the recommended rates drawn up by FNK.

In the interlocutory judgment given by the President of the Utrecht District Court on 11 February 1992 it was ordered, *inter alia*, that FNK cease enforcing the preference rule and the system of recommended and internal rates applied and devised by the association.

SCK

(11) Under its statutes, SCK's object is to promote and maintain the quality of crane-hire firms. This is to be done by drawing up guidelines in the form of regulations on the establishment of a crane-hire business, a certification system and a monitoring system for ensuring compliance with the guidelines. Certification involves the monitoring of a number of aspects of the crane-hire firm iself: compliance with legal requirements concerning tax and social security payments; evidence of insurance cover, creditworthiness and liquidity; and evidence of the competence of the operatives to be employed. Firms also had to show that they were registered with the Chamber of Commerce, which virtually excluded or, at any rate, seriously impeded access by firms from outside the Netherlands. With effect from 1 May 1993, this requirement was modified to the effect that evidence of the enrolment of foreign firms in an equivalent commercial register is also accepted. Certification also covers technical aspects of the cranes themselves. Lastly, certified firms were obliged until 21 October 1993 to apply FNK's general conditions. As mentioned at point 10, these include conditions concerning prices.

Certification requirements are drawn up by the Committee of Experts, while the Certification Committee is responsible for actually carrying out the certification. Especially in the Committee of Experts, members drawn from the sector which awards contracts to crane-hire companies are prominently represented. Among others, DSM and Shell have representatives on SCK's Committee of Experts. One member and the chairman of SCK's board are (former) representatives of Akzo. Firms placing such contracts are thus encouraged to award them to certified firms. The system was made watertight by the 'inhuurverbod' mentioned above (see point (2)) which entered into force on 1 January 1991, under which the certified firm is not allowed to hire extra cranes from firms that are not affiliated to SCK [5]. Since much work in the sector

[1] NMB sectoral survey of carne hire companies, 15 December 1990, p. 19.
[2] NMB sectoral survey, pp. 4, 15 and 19, and p. 19 of FNK's notification.
[3] See point 19 of FNK's notification and the letter dated 3 March 1992 from FNK to various crane-hire companies.
[4] General conditions for the performance of contracts by crane operators, registered with the Arrondissementsrechtbank [District Courts] of Amsterdam and Rotterdam on 1 January 1991.
[5] Before the 'inhuurverbod' was introduced on 1 January 1991, a transitional provision was in force which meant that a certificate-holder was obliged when hiring cranes to check whether the hired equipment and personnel satisfied such requirements as it could assume liability for.

is contracted out, the likely effect has been a significant decrease in the turnover of non-affiliated firms such as Van Marwijk.

As a result of the national court's judgment (see point (13)), SCK had to drop the 'inhuurverbod', which it did on 4 November 1993.

Course of the proceedings before the Commission

(12) Following preliminary examination of the case, the Commission considered lifting, pursuant to Article 15 (6) of Regulation No 17, immunity from fines, as laid down in Article 15 (5) of the same Regulation, since it was of the opinion that Article 85 (1) of the Treaty applied and that the application of Article 85 (3) was not justified, principally because SCK restrained its affiliated companies from hiring cranes from non-affiliated firms and excluded foreign firms from joining, or at least made it difficult for them to do so. This ban on hiring extra cranes from non-affiliated firms had far-reaching consequences, particularly in view of the involvement in SCK of large firms which regularly and frequently award contracts to crane-hire firms. After extensive discussions with FNK and SCK, both orally and in writing, the Commission adopted, under Article 15 (6), Decision 94/272/EC [1] on 13 April 1994.

Course of the proceedings before the national court

(13) In an interlocutory judgment of 11 February 1992, the President of the Utrecht District Court, in proceedings brought by Van Marwijk and others, ordered FNK to suspend application of the priority condition and the system of recommended and internal rates. SCK was ordered to suspend application of the 'inhuurverbod'. This judgment was overturned, similarly in interlocutory proceedings, on 9 July 1992 by the Amsterdam Gerechtshof (Court of Appeal), which took the view, *inter alia*, that it was not for the time being evident and beyond all doubt that the arrangements in question did not have any chance of being exempted by the Commission. Consequently, SCK, on the same day, reinstated the 'inhuurverbod'.

Following the issuing of the statement of objections on 16 December 1992, Van Marwijk and others again applied to the President of the Utrecht District Court, who ruled, in an interlocutory judgment delivered on 6 July 1993, that the ban on the hire of cranes from non-affiliated firms should be suspended, since the Commission had in the meantime made known its views as to the arrangements in question and it was accordingly clear that the ban had no chance of being exempted by the Commission. This judgment was confirmed by the Amsterdam Court of Appeal on 28 October 1993. SCK then accordingly prepared and distributed on 4 November, in order to comply with the Court order, a statement to the effect that the 'inhuurverbod' was withdrawn until such time as the Commission adopted a definitive position on the matter.

II. LEGAL ASSESSMENT

1. Article 85 (1)

Agreements between undertakings and/or decisions by associations of undertakings

FNK

(14) FNK is an association. The members of the association are undertakings engaged in the crane-hire trade. This is clear from Articles 1 and 2 of FNK's statutes and from the explanatory memorandum attached to the notification.

FNK is therefore an association of undertakings within the meaning of Article 85 (1).

(15) FNK's statutes, which form FNK's basic rules and govern the legal relations between FNK and its members, are agreements within the meaning of the said Article (see Commission Decision 88/587/EEC, *Hudson's Bay* v. *Dansk Pelsdyravlerforening* [2]).

(16) FNK's internal rules constitute a decision by an association of undertakings, in that they were adopted under the FNK statutes, and in particular Article 4 thereof. The internal rules are binding upon FNK members.

SCK

(17) SCK is a foundation constituted under Netherlands law, which carries out commercial and/or economic activities. It has as its object the certification of crane-hire companies against payment. It has no public-law basis.

SCK is therefore an undertaking within the meaning of Article 85 (1).

(18) The fact that SCK is a certification institution recognized by the Certification Council and complies with the pertinent European standards (the EN 45 000 series) does not prevent Article 85 (1) from being applicable. The fact that the SCK rules are recognized by the Certification Council does not in any case serve as authority to act in breach of competition law.

[1] OJ No L 117, 7. 5. 1994, p. 30.

[2] OJ No L 316, 23. 11. 1988, p. 43.

(19) The crane-hire firms certified by SCK are also undertakings within the meaning of Article 85 (1).

Participation in the SCK system, which involves acceptance of the statutes and rules, therefore constitutes an agreement and/or a decision by an association of undertakings within the meaning of Article 85 (1).

Restrictions of competition

Recommended and internal rates (FNK)

(20) Prior to the national court's judgment of 11 February 1992, FNK's members were obliged to charge 'reasonable' rates for the hiring of cranes. To this end, FNK published cost calculations and recommended rates based on them [1]. These rates and the rates which crane-hire companies charge each other for the hiring of extra cranes were regularly discussed by companies hiring out cranes of certain categories. As is clear from point 10, FNK was involved in those discussions. The jointly recommended prices, which may or may not have been observed in practice, make it possible to predict with reasonable certainty what the pricing policy of competitors would be. Even if, as FNK maintains, it should be left to the crane-hire companies to interpret the concept 'reasonable', which incidentally is nowhere apparent, it is still established that the reasonability of rates was discussed between the crane-hire companies and FNK. FNK's assertion that only recommended rates 'for internal use' were involved does not alter the fact that FNK members were obliged under Article 3 (b) of the internal rules to charge 'reasonable' rates. The FNK claim that crane-hire companies were 'completely free' when setting their rates is therefore inaccurate. Under Article 3 (c) of the same rules, FNK members have to apply the general conditions drawn up by FNK, in which reference is made to the FNK recommended rates. Under Article 10 (1) (d) of the statutes, expulsion may follow where a member acts in breach of, *inter alia*, the internal rules. For this reason, the system of recommended and internal rates, which is intended to give substance to the concept of 'reasonable rates', falls, in accordance with the Commission's decisions and the case-law of the Court of Justice of the European Communities, and in particular its judgments in Case 8/72, *Vereeniging van Cementhandelaren* v. *Commission* and in Case 45/85, *Verband der Sachversicherer* v. *Commission* [2], within the scope of Article 85 (1) of the Treaty.

(21) The rules may appreciably restrict competition, given the total turnover in the crane-hire business and the share thereof of FNK members (see point (6)).

Ban on the hiring of extra cranes from non-affiliated firms ('inhuurverbod') (SCK)

(22) Under Article 7 of the rules, SCK certificate-holders were not to hire cranes from firms which are not affiliated to SCK. This requirement was ultimately withdrawn on 4 November 1993, at the order of the national court.

(23) The ban on calling on firms not certified by SCK as sub-contractors restricts the freedom of action of certified firms. Whether a ban can be regarded as preventing, restricting or distorting competition within the meaning of Article 85 (1) must be judged in the legal and economic context. If such a ban is associated with a certification system which is completely open, independent and transparent and provides for the acceptance of equivalent guarantees from other systems, it may be argued that it has no restrictive effects on competition but is simply aimed at fully guaranteeing the quality of the certified goods or services.

As will be explained in more detail below, the hiring ban in this case is caught by the prohibition in Article 85 (1), since the SCK certification system is in any case not completely open — not, at any rate, until 21 October 1993 — and does not permit the acceptance of equivalent guarantees from other systems.

(24) From the start, the SCK certification system had features of a closed system. Prior to its introduction (and until 28 April 1992), FNK members were obliged under Article 3 (a) of FNK's internal rules to give preference to other members when hiring cranes. From its inception on 13 July 1984 until 18 September 1987, only FNK members were eligible for SCK certification (Article 2 of the Rules on Certification of the Crane-Hire Trade). Since, pursuant to Article 4 (a) of the FNK statutes, only crane-hire companies established in the Netherlands are admitted to FNK, foreign crane-hire

[1] Points 17 and 18 of FNK's notification.

[2] [1972] ECR 977, at paragraphs 15 to 25, [1987] ECR 405, at paragraphs 34 to 43.

companies were thereby excluded from participating in the SCK certification system. Although, in September 1987, the explicit requirement that only FNK members could be certified by SCK disappeared, in practice it continued to be more difficult for non-FNK members than for members to be admitted to certification. Thus, until January 1992, the costs of participation were considerably higher for non-members than for members (see point (9)). The firms affiliated to SCK are therefore in effect largely the same firms as the members of FNK (see point (5)). For foreign crane-hire firms, access to the certification system was further complicated by the fact that the certification requirements in particular were orientated on the Dutch situation. Thus, until 1 May 1993, it was necessary to register with the Chamber of Commerce and, until 21 October 1993, the FNK general conditions had to be applied (see point (11)).

(25) In addition, the SCK certification system does not provide for the acceptance of equivalent guarantees from other systems — neither from certification systems set up by other private-law institutions in the Community, nor from government schemes which provide for equivalent guarantees relating to safety on the crane-hire market.

By letter dated 12 July 1993, followed by further details in a letter dated 3 August 1993, SCK proposed an amendment to the 'inhuurverbod' formulated in the second indent of Article 7 of the Rules on Certification of the Crane-Hire Trade, to the effect that only cranes may be used 'which are provided with valid evidence of certification, in the form of a prior certificate from either the foundation or some other certification institution — in the Netherlands or abroad — which is qualified to certify crane-hire companies and in so doing applies demonstrably equivalent criteria'.

On 2 August 1993 the Commission informed SCK in writing that this proposal did not satisfy the Commission's objections, since it had not been established that a private-law certification system such as that introduced by SCK adds anything essential to the existing statutory requirements applying to cranes and lifting equipment. All such machines and parts thereof are covered by the abovementioned Directive 89/392/EEC. In addition, KeBoMa, the crane inspection body recognized by the Netherlands, was not regarded at the time as a qualified certification institution, with the result that cranes which had only KeBoMa approval but consequently satisfied all statutory requirements, were still caught by the ban. The proposal of FNK and SCK would therefore have had little or no effect in practice.

(26) The 'inhuurverbod' introduced on 1 January 1991 reinforced the closed nature of the certification system and *de facto* promoted mutual exclusivity between the firms concerned.

Not only did the ban restrict the freedom of action of affiliated firms and hence competition between them, but it also considerably impeded access by third parties to the Dutch market, especially by firms established in another Member State (see the first paragraph of point (11)). SCK has not demonstrated that the current certification system could not function without the abovementioned ban and other restrictions. The fact that the SCK system, after the enforced withdrawal of the said restrictions, evidently still functions, points rather to the contrary.

(27) The anti-competitive nature and consequences of the 'inhuurverbod' as a component part in the SCK certification system must be seen in the light of the frequent use of cranes hired from other crane-hire companies, the market share of firms affiliated to SCK, the position of FNK and the involvement in SCK of the largest firms using hired cranes. The presence of such firms in the organs of SCK has had the practical consequence that SCK certificate-holders are better placed to win the largest contracts. The internal instructions of, among others, Shell and Nederlandse Spoorwegen lay down that only SCK certified crane-hire companies may be used.

(28) Articles 9 and 10 of the SCK rules provide for the suspension or decertification of affiliated firms if they fail to comply with the various requirements, including the ban on hiring extra cranes from non-affiliated firms. Suspension or decertification of an affiliated firm is announced by way of an advertisement in the specialized press (see Article 8 of the SCK rules). There is an implied threat of decertification of other affiliated companies which continue to do business with the firm in question, and the general impression is created that it is better to avoid doing business with that firm. Such advertisements are thus extremely damaging to the firms concerned.

(29) While FNK requires its members to be established in the Netherlands (Article 4 (a) of its statutes), SCK's certification requirements, in the version originally notified, were entirely and exclusively

based on and geared to the situation in the Netherlands, so that firms from other Member States, in particular Belgium and Germany (see point (11)), were excluded or, at any rate, had their access to the Dutch market made considerably more difficult. On the other hand, Dutch crane-hire firms which wish to operate on, for example, the Belgian and German markets have to meet no requirements other than that they must comply with the statutory conditions prevailing in those countries. Germany and Belgium have a comparable system to that in the Netherlands for the statutory inspection of cranes.

(30) SCK's 'inhuurverbod' may appreciably restrict competition, in view of the total turnover in the crane-hire business, the market share of SCK certificate-holders and the involvement in SCK of the firms that award contracts.

Effect on trade between Member States

(31) FNK and SCK dispute that trade between Member States is affected. They cite the limited extent of cross-border operations in the industry, arguing that 'mobile cranes are by their nature not meant to be transported'. However, it is evident from the FNK handbook that Krupp cranes can travel at maximum speeds of between 63 and 78 kph (1991 handbook, page 10). An advertisement on page 124 of the FNK handbook offers for hire cranes with a lifting capacity of 12 to 400 tonnes which 'can be set up rapidly anywhere'. This means (as indeed the word 'mobile' implies) that it is perfectly possible to move mobile cranes and that the system therefore constitutes a potential restriction of intra-Community trade. This remains true even if the participants do not at present engage in intra-Community activities, as the Court of Justice held in Case 107/82 *AEG-Telefunken* v. *Commission* [1]. The fact that two of the complainants are from Belgium shows that intra-Community trade is a genuine possibility. For the reasons set out at points (21) and (30), the (potential) effect on trade is appreciable.

2. Article 85 (3)

(32) The statutes and internal rules of FNK and the statues and rules of SCK were notified to the Commission with a view to obtaining negative clearance or, alternatively, exemption under Article 85 (3).

(33) In order to qualify for exemption, FNK and SCK must, *inter alia*, show that the agreements or decisions by associations of undertakings contribute to improving the crane-hire business while allowing consumers a fair share of the resulting benefit. The improvement must entail objective and appreciable advantages such as to compensate for any disadvantages they cause in the field of competition ; see the judgment of the Court of Justice in Joined Cases 56 and 58/64, *Consten and Grundig* v. *Commission* [2].

Recommended and internal rates (FNK)

(34) It has not been established that the obligation to apply 'reasonable' rates, irrespective of the alleged aim of increasing transparency on the market, contributes to improving the crane-hire business and that consumers, in this case the firms which hire cranes, enjoy a fair share of the resulting benefit. On the contrary, according to the independent sectoral survey referred to at point (10), the recommended and internal rates applied, which were fixed by FNK in order to spell out what is meant by 'reasonable' rates, were generally above the market rates. The authors of the survey saw part of the explanation in the fact that 'on the market one has to deal with competition'.

(35) It is therefore not possible, for the reasons set out above, to grant exemption under to Article 85 (3) of the Treaty.

The 'inhuurverbod' (SCK)

(36) The question whether the 'inhuurverbod' is eligible for an exemption must be seen in the context of the certification system in which it operates.

SCK has submitted that the object of the certification system is to create transparency on the market and that the 'inhuurverbod' must be seen as the essential instrument for guaranteeing the quality of the cranes and of the service provided by the participating firms. The certification system set up by SCK is claimed to provide added value over and above the relevant requirements laid down by statute or regulation. It is also contended that the 'inhuurverbod' is the only means of effectively monitoring compliance with the requirements imposed by SCK. The 'inhuurverbod', so it is argued, is prescribed by the Certification Council's recognition criteria, which are based on the ISO standards for quality systems.

[1] [1983] ECR 3151, at paragraph 60.

[2] [1966] ECR 299, especially at p. 348.

(37) The Commission does not share SCK's view. It has not been established that the SCK certification system does provide real added value over and above the statutory rules applicable. The requirements imposed on the affiliated firms are virtually identical to the statutory ones, particularly where tax and social security provisions and compliance with safety rules are concerned (see point 11). This was explicitly recognized by SCK in its notification. SCK observed in particular that 'it intends only to ensure that a certified firm can demonstrate that it meets the statutory requirements' (1).

It is the responsibility of the authorities to ensure compliance with such statutory provisions by all firms, whether or not they participate in the system; see the judgment of the Court of First Instance of the European Communities in Case T-30/89, Hilti AG v. Commission (2). The complainants have handed over documents to the Commission from which it is clear that firms which do not participate in the SCK certification system can likewise demonstrate that they meet the statutory requirements. The Commission is entirely convinced that the restrictions imposed on affiliated firms and the disadvantages which result for non-affiliated firms clearly outweigh any advantages claimed by SCK.

Most of the safety requirements which SCK imposes for certifying a crane-hire firm are also imposed by the safety decrees based on the Law on Conditions at the Workplace (Arbowet) and by the various ministerial regulations. Official supervision of compliance with such provisions is carried out by KeBoMa and the Labour Inspectorate in particular. Similarly, most of the non-safety-related requirements which SCK imposes, such as those relating to the payment of tax and social security contributions, registration with the Chamber of Commerce, third-party insurance, creditworthiness and application of the collective labour agreement, are already covered by statutory provisions. SCK goes beyond statute law by imposing requirements regarding the manner of conducting business, but that alone is insufficient to justify the restrictions of competition imposed.

Even if the advantages claimed by SCK for the certification system should outweigh the disadvantages thereof for non-affiliated firms, it has still not been shown that the SCK certification system could not function without the 'inhuurverbod'. The system has in fact functioned without the 'inhuurverbod' since 4 November 1993 (see point (11)). The 'inhuurverbod' is, accordcing to SCK, prescribed by paragraph 2.5 of the Certification Council's recognition criteria, which is derived from the ISO standards for quality systems. Yet paragraph 2.5 offers three ways of monitoring the quality of the supplier firm, in this case the crane-hire firm hiring extra cranes. It makes it possible, *inter alia*, for the latter itself, as the principal, to judge on its own responsibility whether another crane-hire company called in meets the statutory quality requirements — for example, by the submission of testing certificates, a lifting certificate, etc. In this way, a crane-hire company which, for whatever reasons, does not wish to be affiliated to SCK still has access to the market in principle, and quality does not suffer.

(38) The fact that the Commission's policy on certification allows scope for private-law certification systems that are designed to provide supplementary monitoring of compliance with statutory provisions cannot detract from the principle that the details of such systems must conform to the competition rules laid down in the Treaty. Restrictions on competition that are caught by Article 85 (1) cannot therefore be justified solely on the grounds that the introduction of a certification system necessarily fits in with the Commission's certification policy.

(39) It is therefore not possible, for the reasons set out above, to grant exemption under Article 85 (3) of the Treaty.

3. Article 3 of Regulation No 17

(40) Under Article 3 (1) of Regulation No 17, the Commission, where it finds that there is infringement of Article 85, may by decision require the undertakings concerned to bring such infringement to an end.

4. Article 15 of Regulation No 17

(41) Under Article 15 (2) (a) of Regulation No 17, the Commission may by decision impose of undertakings or associations of undertaking fines ranging from ECU 1 000 to ECU 1 000 000 or a sum not exceeding 10 percent of the turnover in the preceding business year of each of the undertakings

(1) Point 28 of SCK's notification. See also points 26 and 27 of that notification. Evidently, SCK is now distancing itself from its own views (Answer to the statement of objections of 21 October 1994, p. 19, footnote 3).

(2) [1991] ECR II-1439, at paragraph 118.

participating in the infringement where, either intentionally or negligently, they infringe Article 85. In fixing the amount of the fine, the Commission must have regard to all relevant factors, in particular the gravity and the duration of the infringement.

(42) Under Article 15 (5) of the said Regulation, no fines may be imposed in respect of activities associated with agreements and concerted practices after notification to the Commission and before the Commission's decision under Article 85 (3). In Decision 94/272/EC, mentioned above, however, the Commission, acting under Article 15 (6) of Regulation No 17, declared this provision to be inapplicable in the present case.

(43) The Commission is of the opinion that in the present case a fine should be imposed on FNK with regard to the system of recommended and internal rates and on SCK with regard to the 'inhuurverbod'.

(44) FNK and SCK cannot have been unaware of the fact that the offending behaviour served to restrict competition, or at any rate has that effect.

(45) In determining the amount of the fine, the Commission takes account in particular of the following factors:

— the said provisions artificially control or restrict the Netherlands crane-hire market and thus distort the Community market in crane-hire,

— FNK and SCK which are linked closely to each other, comprise a great many undertakings which occupy together an important part of the crane-hire market,

— the restrictions were dropped only after a court order to that effect.

(46) FNK's rules on the application of 'reasonable rates' were introduced on 15 December 1979 and were in force until 28 April 1992. The FNK rules were notified to the Commission on 6 February 1992. Since Decision 94/272/EC withdrawing immunity, from fines covered only the prohibition on hiring extra cranes and not the FNK's 'reasonable' tariff system, the fine imposed on FNK can only cover the period up to 6 February 1992. The 'inhuurverbod' in the SCK rules was introduced on 1 January 1991 and declared inapplicable between 17 February and 9 July 1992 and again with effect from 4 November 1993, following rulings by the national court. The period between notification of the SCK agreements on 15 January 1992 and the notification on 22 April 1994 to SCK of Decision 94/272/EC is not taken into account for determining the amount of the fines imposed on SCK,

HAS ADOPTED THIS DECISION:

Article 1

FNK has infringed Article 85 (1) of the EC Treaty by applying a system of recommended and internal rates between 15 December 1979 and 28 April 1992, which enabled its members to predict each other's pricing policy.

Article 2

FNK shall terminate the infringement referred to in Article 1 forthwith, if it has not already done so.

Article 3

SCK has infringed Article 85 (1) of the EC Treaty by prohibiting its affiliated firms during the period 1 January 1991 to 4 November 1993, with the exception of the period between 17 February and 9 July 1992, from hiring cranes from firms not affiliated to SCK, as a result of which, given the fact that the SCK certification system in the said period did not meet the criterion of openness and did not allow the acceptance of equivalent guarantees from other systems, access to the Netherlands crane-hire business by crane-hire companies not affiliated to SCK, and in particular foreign crane-hire companies, was impeded.

Article 4

SCK shall terminate the infringement referred to in Article 3 forthwith, if it has not already done so.

Article 5

1. A fine of ECU 11 500 000 is imposed on FNK in respect of the infringement set out in Article 1.

2. A fine of ECU 300 000 is imposed on SCK in respect of the infringement set out in Article 3.

Article 6

The fines referred to in Article 5 shall be paid in ecus within three months of the date of notification of this Decision into the following bank account of the Commission of the European Communities:

310-0933000-34
Bank Brussel Lambert
Europees Agentschap
Rondpunt Schuman 5
B-1040 Brussel.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Institute on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, namely at 9,25 %.

Article 7

This Decision is addressed to:

1. Stichting Certificatie Kraanverhuurbedrijf
   Postbus 551
   NL-4100 AH Culemborg.
2. Federatie van Nederlandse Kraanverhuurbedrijven
   Postbus 312
   NL-4100 AH Culemborg.

This Decision is shall be enforceable pursuant to Article 192 of the EC Treaty.

Done at Brussels, 29 November 1995.

For the Commission
Karel VAN MIERT
Member of the Commission